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be no accident, but poetic design. No careful student of Homer can fail to grasp the poetic purpose in this. The poet constantly avoids scenes of too much tragic pathos or too great emotional intensity. Examples abound, but two will suffice. When Hector met his death at the hands of Achilles the wife was not a witness of that scene, even if it was acted in full view of the walls, but she was busy with her work in her own room, and at the very moment he was slain she is calmly at work on peaceful scenes:

χ 440: ἀλλ' ἥ γ' ἰστὸν ὕφαινε μυχῷ δόμου ὑψηλοῷ
δίπλακα πορφυρέην, ἐν δὲ θρόνα ποικίλ' ἔπασσεν.

What an opportunity the poet had to place Andromache on the walls as a spectator and "to tear a passion to tatters"! This composure is shown again in the fact that we never hear the groans or the lamentations of the wounded and the dying, and no soldier raises himself to his knees and breaks the death sobs and groans by saying, "Take this lock of hair to mother," or "Tell father I die, but I have kept my shield and sword."

If the scene of parting in either case had been put at the moment of greatest danger or intensest emotion it would have violated that fine poetic and reserved feeling which Homer everywhere shows.

The placing of the parting words of Hector and Andromache and of Odysseus and Calypso well before the last and final farewell is a perfect example of the Homeric and Hellenic reserve which is best expressed by the phrase *μηδὲν ἄγαν*, and which induced the great Attic orators to close their speeches with calmest utterances.

The same unerring poetic judgment shows itself in the parting of Hector and Andromache and in the parting of Odysseus and Calypso.

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AULUS GELLIUS ON *MALA PROHIBITA* V. *MALA IN SE*

In his discussion "Of Laws in General" Blackstone¹ says that every law may be divided into several parts, viz., declaratory, directory, remedial, and vindicatory. He explains that those rights established by God and nature need not the aid of human laws and receive no additional strength by being enacted by the legislature nor can the legislature destroy them; nor do divine or natural duties receive stronger sanction by being declared to be duties by law. He continues: "The case is the same as to crimes and misdemeanors that are forbidden by the superior laws and are therefore styled *mala in se*." Again Blackstone says:² "In relation to those laws which enjoin only positive duties and forbid only such things as are not *mala in se* but *mala prohibita*

¹ Introduction, p. 54.

² Introduction, p. 58; see also Holland, *Jurisprudence* (9th ed.), p. 35; Kent, I, 467; Cyc, 36, 1; Bouvier, *Law Dictionary*, s.v. "Mala in se."

merely, . . . conscience is no further concerned than by directing a submission to the penalty. . . ." That is to say, it is not a question of morals in case one commits *mala prohibita*. Austin¹ suggests that the distinction between *mala prohibita* and *mala in se* is one made by modern writers and tallies with the distinction of crimes *iuris gentium* and crimes *iure civili* made by the writers of the Roman law.

An interesting passage in Aulus Gellius² seems to show that the distinction between *mala prohibita* and *mala in se* was recognized in non-legal literature much earlier than Austin supposes. This essay of Gellius represents Tiro, the amanuensis of Cicero, as making a criticism upon the speech of Cato in defense of the Rhodians. Cato had said that the Rhodians should not be punished simply because they had wished for the success of Perseus and the defeat of the Romans in the late Macedonian war. He argued that only overt acts, not thoughts and desires, are punishable. The law forbade the holding of more than five hundred *iugera* of land. But Cato says: "We all desire more but are not punished for that desire." Now Tiro asserts that it was an unfair and sophistic argument to compare the desire to have more than the amount of land allowed by law with the desire to wage an unjust and impious war against the Romans. Gellius defends Cato and asserts that he was shrewd in selecting examples of acts.³

quae non iure naturae aut iure gentium fieri prohibentur [that is *mala in se*] sed iure legum rei alicuius medendae aut temporis causa iussarum; sicut est de numero pecoris et de modo agri praefinito. In quibus rebus, quod prohibitum est, fieri quidem per leges non licet; velle id tamen facere, si liceat, inhonestum non est—(sunt ea quae) neque facere neque velle per sese honestum est.

Gellius' first point then, just as Blackstone's, is that it involves moral turpitude to do or wish to do certain things which are common-law crimes or misdemeanors, contrary to the *ius naturae* or the *ius gentium*. These things are *mala in se*. But there is no question of morals involved in the doing or the wishing to do those things which are forbidden by law, simply because the doing of them has been found to be contrary to public policy. The latter are *mala prohibita*. Paulus says⁴ that to commit theft is prohibited by the law of nature. Blackstone⁵ enumerates theft as one of the things which are contrary to the law of God and of nature and as a *malum in se*.

A second point, a part of this same argument of Cato, is that while certain desires may be culpable morally, they are not punishable legally. He says⁶ that inasmuch as we should not regard it as a credit to a man that he wished to do a favor (*voluisse bene*) but did not do it, so it should not be regarded as a discredit that he wished to do harm but did not. Deeds only are subject to legal review, but mere desires, empty of attempt at fulfilment, are not subject to the

¹ *Jurisprudence*, p. 829.

⁴ *Digest*, XLVII, ii, 1, 3.

² *Noctes Atticae*, VI, iii, 45-47.

⁵ Introduction, p. 54.

³ *Ibid.*

⁶ *Noctes Atticae*, VI, iii, 38.

laws or to punishment. The contrast which students will recall is made in the classical Greek writers, especially in the orators, between word and deed, λόγος and ἔργον, is here the foundation of a legal argument in favor of the Rhodians who were practically on trial before the Roman senate. The contrast is suggestive of Holland's¹ definition of law, which is, in part, "a general rule of external human action."

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"IUGIS AVULSA," *AEN.* ii. 631

The tree, Virgil says, has been cut by the farmers' axes. It totters, its leaves quiver, its top bows:

vulneribus donec paulatim evicta supremum
congemuit traxitque iugis avulsa ruinam.

As far as I know, editors from Servius down are unanimous in taking *iugis* to mean the mountain ridge. Several, however, feel a difficulty. Knapp says: "Strictly, the tree is severed from its stump and roots, but since these bound it to the *montes* and the *iuga*, the poet may fairly speak of the tree as severed from the heights."

Henry, Conington, and Papillon and Haigh all recall Ovid M8, 775-77:

. . . labefactaque tandem
ictibus innumeris, adductaque *funibus* arbor
corrui, et multam prosertavit pondere silvam.

They suggest that Virgil's tree was torn away (with ropes) from its base, but they obtain this interpretation by supplying the word for "base" or "stump"; all understand *iugis* as referring to the mountain heights. Conington explains this view at some length: "Henry . . . seems also right in connecting *iugis* with *traxit ruinam* and understanding *avulsa* of tearing away the tree from the stump with ropes, like the description in Ovid M8, 776. *Traxit ruinam iugis* will then mean that the tree fell heavily, and lay at length along the mountain, not, as has been supposed, that part of the mountain gave way with the tree."

It chanced that I have lately had in a Virgil class a young man from the Michigan lumber country. To him there was no mystery about the word *iugis*. That part of the description appealed to him at once as evidence that Virgil was a genuine countryman, and knew how trees were felled. He reminds us that cuts are made into opposite sides of the bole until the tree is torn from what remains uncut. This leaves a wedge-shaped projection, more or less splintered into jagged *cacumina*. "We always call that the 'ridge,'" said the student-lumberman.

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¹ *Jurisprudence*, p. 39 (9th ed.).